



POLICE DEPARTMENT

December 21, 2007

MEMORANDUM FOR: POLICE COMMISSIONER

Re: Sergeant Henry Delacruz  
Tax Registry No. 920190  
Police Service Area 5  
Disciplinary Case No. 82622/07  
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The above-named member of the Department appeared before me on July 18, 2007, August 1, 2007, and August 8, 2007, charged with the following:

1. Said Sergeant Henry Delacruz, while assigned to PSA#5, while on duty, on or about August 27, 2005, at about 0020 hours, in the vicinity of [REDACTED] County, used excessive force in that he thrust his forearm against the throat of an individual known to this Department.

P.G. 203-11, Page 1, Paragraph 2 - FORCE

2. Said Sergeant Henry Delacruz, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, was discourteous in that he used the words "fuck" and "fucking" on numerous occasions when addressing individuals known to this Department.

P.G. 203-09, Page 1, Paragraph 2 – DISCOURTESY TO CIVILIAN

3. Said Sergeant Henry Delacruz, assigned as indicated in Specification #1, at the date, time, and location indicated in Specification #1, did wrongfully fail to provide his name and shield number to an individual known to this Department.

P.G. 203-11, Page 1, Paragraph 1 – PUBLIC CONTACT

The Department was represented by Andre Applewhite, Esq., Department Advocate's Office, and the Respondent was represented by Philip Mellea, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

### DECISION

The Respondent is found Guilty as charged.

### EVIDENCE

#### The Department's Case

The Department called Moziah Davis, Joshua Foster, and Darryl Veale as its witnesses.

#### Moziah Davis

Moziah Davis ("Davis") is a 21-year-old male who resides at [REDACTED] County. Davis testified that he has lived at the same residence for the past eight to nine years and he resides with his mother. He is a supervisor at Circuit City where he has been employed for the past four years. Davis stated that he is a member of the Jehovah's Witness faith, and he is in the organization with two other friends, Darryl Veale ("Veale") and Joshua Foster ("Foster"). He said that he has been friends with Veale and Foster for the last eight to nine years and they met through the Jehovah Witness organization.

Davis stated that on August 27, 2005, at approximately 12:20 a.m. in the vicinity of his residence, he was coming from a bowling event with Veale and Foster. He said

that Veale was driving a white, two-door automobile when they stopped in front of his [Davis's] residence. Davis explained that he was seated in the back seat of the vehicle. They were in the midst of saying their good byes when two people in regular clothes approached the vehicle and said, "Stop, freeze." Davis testified that he and his friends remained in the vehicle. Davis said he immediately responded, "What's going on? What happened?" Davis explained that he thought the two males might be police officers, but they were in regular clothes and did not have a badge or identification card visible and he and his friends made inquiries of the two men as to who they were.

One of the males walked over to the driver's side of the vehicle where Veale was seated and requested his license and registration. Davis said that he heard Veale ask several times, "But who are you?" and the exchange went back and forth several times between Veale and the male at his driver's side window. Veale repeatedly asked the male to identify himself and the male told Veale, "Just follow my orders, do as I say, give me your license and registration." Eventually the male at Veale's window ordered all of them to step out of the vehicle. Davis stated that after he exited the vehicle, he was patted down and frisked, and he was also requested to provide his identification, which he did. He stated that likewise Foster was also frisked and patted down. Davis stated that he inquired as to what the problem was, but no one answered him. He explained that although the two men had guns, it was not uncommon to see people in the Bronx with guns who were not police officers. Davis further explained that when he saw police officers in plain clothes in the Bronx, they had a badge or some sort of identification around their necks, but neither of these males had identification around their necks.

Davis said eventually one of the males took Veale's identification and went to a car. Davis said that was when he first noticed the car. He assumed the male was checking out the identification in the car. Davis recalled that the male who took Veale's identification was not the Respondent because he was a taller guy who was wearing a tee shirt with the animated character, "Punisher" on it. Davis stated that he was on the passenger side of Veale's vehicle speaking with another police officer one-on-one. He said that the officer had already searched him and saw his identification, but he wanted the officer to identify himself and tell him what was going on. The police officer responded, "Shut the F up and let us do our job."<sup>1</sup> Davis explained that the police officer cursed and used the "F" word. He told the officer that he was using "vulgar content" when he was asking him a regular question in a regular tone of voice. Davis stated that he decided at that point to just keep quiet.

Davis testified that just as Veale continued to ask "Who are you?" he observed the Respondent exit the car and say, "I got this one." He then rushed up to Veale who was standing at the back of his own car and put his right forearm under Veale's chin. Davis said that the Respondent was using some force because Veale was a big guy and the motion the Respondent was using caused Veale to lean back over his car. Davis heard the Respondent say, "Let me do my job. I don't question where you work and what you do, just let me do my f-ing job." Davis heard Veale respond that he has no problem telling the Respondent where he works and what he does. The Respondent asked Veale where he works and Veale replied that he works at Con Edison and has another job at Home Depot. Davis heard the Respondent yell at Veale a few times, "You are an f-ing moron."

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<sup>1</sup> Davis explained that the police officer used the profane word, "fuck," but for religious reasons, he is forbidden from saying the word. He instead used the "F" word to represent the profanity.

Davis saw that Veale was getting heated, so he spoke to him and told him to calm down and just let things take their course.

Davis stated that at the same time the Respondent put his arm under Veale's chin, their friend Foster, who was standing next to Davis began yelling, "What's going on, why are you doing that...what's the problem?" Foster then moved forward in the direction of the incident. Davis said that one of the police officers then arrested Foster by pushing him against the car, placing his hands behind his back and placing handcuffs on Foster. At the point that Foster was arrested, Davis said the Respondent removed his forearm from under Veale's chin. At that point, Veale proceeded to take out his cell phone and stated that he was going to call his mother and tell her what was taking place. The Respondent told Veale that he could not make the call, and as Veale proceeded to make the call, he was placed under arrest. Davis did not recall if Veale's cell phone was removed at that time, but he recalled that Veale was arrested at that time.

Davis recalled that one of the officers asked him if he knew how to drive. Davis informed him that he only had a permit and was not authorized to drive. Davis said the officer then told him to go home as Veale and Foster were going to be removed from the scene. Davis said he walked up to the car where Veale was detained and advised him that he would go to his house and tell his mother what was taking place and then he would walk over to the station house. Davis testified that the officer wearing the Punisher tee shirt drove Veale's car away from the scene. Both Foster and Veale were taken away from the scene. Davis stated that he waited for the cars to drive off before he proceeded to walk to Veale's house which was one block away. Davis testified that he was not arrested that night, that he had never been arrested, and that he has no civil suit pending.

Davis denied that he ever cursed at the scene or got loud with the males. He also denied hearing either Veale or Foster use profanity. He explained that Veale was upset about the situation, but he never yelled at anyone during the incident.

During cross-examination, Davis acknowledged that he spoke with his friends about this incident. They discussed how they were going to get to court to testify. He said they spoke about the incident on the way to court. When asked what streets he would take to get from the bowling alley to his house, Davis said that he did not know the names of the streets, but he knew which direction he would travel. He stated that he knew how he would travel by train, but not by car. He said that he would take the No. 5 train to [REDACTED]

Davis testified that he did not observe the Respondent in a vehicle when Veale drove up to his [Davis's] house. He estimated that they were at his residence between three and five minutes before the "assumed officers" approached the vehicle. He denied that either he or his friends had exited the vehicle when the officers approached Veale's car. He recalled that two individuals who could possibly have been police officers approached the car, and neither of the two was the Respondent. Davis stated that Veale continued to question the male about who he was even after he supplied his own identification. He denied that the male said to Veale that he would let Veale know what was occurring once he came back to Veale's car with his information. Davis recalled that he and Foster were with one police officer and that the officer with the Punisher tee shirt was the one who took Veale's identification card. He described him as having a bald head and appearing to be of Spanish descent. He also recalled that that same officer ordered all of them to exit Veale's car. Davis also recalled that the guns that these males

were carrying were visible. He noted that they had flashlights and were checking into the car. He explained that when he mentioned that the guns were visible, he could see them on their waist area. He acknowledged that none of the officers had a shield displayed around their neck and none of them identified themselves either. He recalled hearing the Respondent say, "I got this one" as he exited the vehicle he was in, walked up to Veale, and shoved him in the chin area by placing his forearm there.

Davis acknowledged that the Respondent used force against Veale without having any conversation with him first. He also admitted that the Respondent used the "F" word numerous times during the altercation with Veale. Davis gave a description of the people involved in the incident. He testified that Veale was approximately 5'10" and about 220 pounds, with a stocky build and a big upper body. He noted that the officer in the Punisher tee shirt was the tallest of them all. He was approximately six feet tall with a bald head and he was the officer who took Veale's identification card. He described the police officer who frisked him to be approximately 5'9" to 5'10" in height also with a bald head. He estimated that the Respondent stood about 5'10". Davis stated that when the incident began he estimated that there were 20 to 30 people out on the street. He noted there were two buildings on either side of the street and that as the incident progressed people began to come over. He estimated that once the handcuffing took place, the crowd grew to approximately 50 people observing what was transpiring. He also believed that once Veale's cell phone was taken away from him, he was never able to make a telephone call. He stated that he was not sure, but he believed Veale's cell phone was taken away from him when he was arrested.

Joshua Foster

Foster is a 22-year-old male who resides in the [REDACTED] with a roommate. He testified that he is currently working as an electrical line splicer. He stated that he met Veale approximately six to seven years ago and that he met Davis because he was a friend of Veale's. He said that the three of them have been good friends for the past six years. Foster stated that on August 27, 2005 at approximately 2:30 a.m., he was seated in the front passenger seat of Veale's vehicle when they arrived at Davis's residence. They had been parked there for five or ten minutes when he was in the process of getting out of the seat so that he could move the seat forward to allow Davis to exit from the back of the vehicle. He observed an unmarked vehicle approach Veale's car from behind. He then heard over a loudspeaker words to the effect to get back inside the vehicle. Foster stated that they remained in the vehicle, and then he witnessed three officers come out of their vehicle while he noticed a person believed to be the Respondent approach Veale's driver's side window and request his license, registration, and insurance.

Foster testified that he heard Veale respond that he had his license and registration, but that he left his insurance card upstairs. He also heard Veale ask the person for identification and the reason why he was being stopped. Foster said he heard the Respondent (whom he identified) tell Veale, "I don't have to tell you who I am." Foster stated that the Respondent directed all of them to get out of the car which they did. Words continued to be exchanged between Veale and the Respondent. Veale continued to ask the Respondent who he was as the Respondent replied, "I don't have to f-ing tell you who I am."<sup>2</sup> Foster explained that in his neighborhood people were robbed all the

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<sup>2</sup> Foster testified that for religious reasons he does not swear, but that the Respondent used profanity which he represented by the "F" word.



time by occupants in unmarked vehicles. He further explained that they were all nervous about the situation. At some point, Foster said that the Respondent was given Veale's paperwork and he assumed the Respondent went back to his car to run the paperwork. As Veale continued to ask for some type of identification, Foster testified that he observed the Respondent push both of his partners out of the way and push Veale onto his car with his forearm against his throat. The Respondent then pulled out his badge and said, "This is who the F I am, this is who the F I am." Foster said that when the Respondent pulled the badge from underneath his shirt, this was the first time he believed the males were actually police officers.

Foster testified that he was observing his best friend and his first response was that Veale was unable to breathe. He looked at the other officers and asked them to help, but no one was responding. He took a few steps forward toward Veale and he was then placed under arrest. Foster stated that he was thrown into the vehicle by two of the three police officers, and the two police officers were not including the Respondent.

Foster stated that prior to this incident he had never been arrested and had never been involved in any other police activity. He stated that he has worked at Consolidated Edison for the past three years. Foster said that he did not know these individuals were police officers. He noted that their vehicle had lights on top of it, but in his neighborhood he has noticed non-police vehicles with these types of lights. He stated that he does not have a civil suit pending.

During cross-examination, Foster stated that the route they took from the bowling alley to Davis's house was [REDACTED] to the thruway to the Major Deegan, where they exited at [REDACTED] Street. He noted that they made a right on [REDACTED] Street onto [REDACTED]

Avenue and ended up in front of Davis's house. He stated that they do not always take the same route to Davis's house. He recalled that on that night, they were not playing music in the car. Foster reiterated that it was the Respondent who approached Veale's car first and he did not have his shield out around his neck.

Foster stated that he did not observe the Respondent with a gun or a flashlight. He said that he did not know definitely which officer ordered them out of the car. He recalled that the Respondent went back to his car with Veale's paperwork after he and his two friends exited Veale's car. Subsequently the Respondent returned to Veale and placed his forearm under Veale's chin. Foster acknowledged that he was interviewed by a Civilian Complaint Review Board ("CCRB") investigator named Abels on September 8, 2005. Foster said that he could not recall telling the CCRB investigator that the Respondent choked Veale before going back to the car. Foster said that the Respondent did in fact push the other two police officers as he ran up to Veale and placed his forearm into his neck area. He denied ever telling the CCRB investigator that the Respondent choked Veale with his palm. He stated that when he said forearm, it may have sounded like palm to the investigator. He explained that they had a lengthy discussion trying to clear up confusion that the investigator had. He acknowledged that he may have said "palms" by mistake when he meant "forearms."

He also recalled stating that he heard the Respondent say as he approached Veale, "I got this," then he proceeded toward Veale. He acknowledged that he could have also heard this phrase from the CCRB investigator as well as his friends. Foster testified that the windows in the car may have been down on his side, but he recalled Veale rolling down his window when the officer approached his window. He could not recall with

certainty whether or not music was playing in the car and he noted that the incident occurred two years ago.

Foster recalled the Respondent stating, "This is who the f- I am" as he pushed his shield into Veale's face when Veale was asking who he was. Foster stated that he tried to do a profile of the males to see if they were in fact police officers. He explained that he looked to see if they were wearing a police officer's vest or badge, but he did not see either item. He noted that they did not have badges hanging out of their shirts. He noted that he saw lights on their vehicle, but he did not hear any sirens. He stated that for these reasons he did not believe the males that stopped him were police officers. He denied that Veale was speaking in a heated manner to the males. He stated that he heard Veale say words to the effect, "Why can't you work with us. I showed you my identification," but Veale never became heated in his conversation. He did note, however, that later the Respondent and Veale began to have a somewhat heated conversation. Foster estimated that there were possibly seven people on either side of the street from Davis's building.

Foster stated that he complained to the CCRB that he was "physically mishandled" in this matter. He also alleged that the officers used foul language and that maltreatment took place at the station house also. Foster said that he was informed by the CCRB investigator that since there were no witnesses to the allegations in the station house, the allegations would be unfounded. When questioned as to whether he saw the officers with guns, Foster stated that he did not focus on that. He said that he recalled seeing lights either on top of the car or on the dashboard when Veale's vehicle was stopped.

Foster said that Veale had conversation with all of the officers when he told them that he was concerned that he was being set up. He recalled that the conversation became heated when he had the encounter with the Respondent and also when Veale attempted to call his mother on his cell phone. Foster explained that Veale stated that he was going to call his mother to let her know what was transpiring. The officers began to yell at him and tell him to get off of the cell phone. As Veale held on to his phone, he was placed in handcuffs and then put into the police car. Foster admitted that he was placed in handcuffs before Veale. Foster stated that he did not observe any difference in the crowd and that it remained at seven people.

During redirect examination, Foster noted that during the incident he was focused on his friends. He was not paying attention to the crowd or whether or not the males had guns in their possession or flashlights. Foster noted that he did not recall the crowd changing, but he stated that people could have come and gone without him noticing. He also stated that a window could have been up or down in the car and he could not specifically recall the details of the car windows in Veale's car. Foster testified that neither him, Veale or Davis used any profanity during this incident. Foster said he did not believe that Davis said anything at all. He recalled that the Respondent's profanity was first directed at Veale, and then he used profanity toward him and Veale.

Foster testified that someone grabbed Veale's cell phone and threw handcuffs on Veale, but he did not know who it was that took Veale's cell phone.

During continued cross-examination, Foster stated that he recalled Veale asking the Respondent for his name and his shield number. Foster was read a question from his CCRB interview in which Abels asked him what Veale asked for. Foster was also read

his response in which he stated: "He [Veale] asked for his badge number, and that was right before he threw him [Veale] in the car." Foster explained that Veale asked the Respondent for his name and badge number at different times during the incident.

Darryl Veale

Veale is a 23-year-old male who resides with his mother on the [REDACTED] where he has lived since 1993. Veale said that he has two jobs, one with Consolidated Edison ("Con Edison") as a meter reader and the other with Home Depot where he answers the phone and works in the customer service department. He stated that he is friends with Davis and Foster and that all three of them are practicing Jehovah's Witnesses. He said that he has known Davis for as long as he can remember and that he met Foster approximately nine years ago.

On August 27, 2005 at about 12:30 a.m., Veale testified that he was driving from a bowling alley and Davis and Foster were in his car. He said that he was dropping Davis home because Foster lived with him and they rented a room together in his [Veale's] mother's house. They had been at Davis's house for about five minutes saying their goodbyes when two men ran up to his car. Veale stated that one man came up to the driver side and asked him for identification. Veale said that he responded, "Who are you and why am I being stopped?" Veale testified that the male replied, "Don't worry about that, don't worry about who we are." Veale said that he showed the male his license, registration and insurance, but then he, along with Davis were told to exit the car. Veale said the male told him to get to the back of his car, which he did. Veale estimated that it was between five and ten minutes from the time he was stopped until he was ordered to

exit his car and stand at the back of his car. Veale testified that he continued to ask the male who he was and the male replied that he (Veale) knew who he was because his car had a "siren" on top of it. Veale stated that he told the male that he had a siren on top of the car where he worked also.

Veale explained that he asked the male at least three times who he was. He explained that he kept questioning the male because he had a previous encounter once when his car was stopped. In that encounter, he was stopped by a male driving an Impala car. The male asked him for his identification. When he provided his identification to the male, the male got back into his Impala and drove off with his identification. Veale said this is why he kept asking the male who he was and why he was being stopped. Veale stated that on this occasion, the male asked him for his identification three times also. Veale said that after the third request, he supplied the male with his identification. Veale testified that during this incident, not one of the three males who stopped him and his friends either identified himself or had a shield around his neck.

As Veale continued to question the male about his identity. Veale said, "Now you have my information, who are you and why am I being stopped?" Another male [identified as the Respondent] exited a car and stated, "I got this one." Veale testified that the Respondent came toward him as he stood at the back of his own car and took his right forearm and put it "in my throat." The Respondent asked him where he worked and when he responded that he worked for Con Edison and Home Depot, the Respondent used profanity and called him a "f-ing idiot."<sup>3</sup> He also said, "I don't come to your f-ing job and tell you how to do your f-ing job." Veale stated that he observed Foster with his

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<sup>3</sup> Veale testified that for religious reasons he does not swear. He stated that the Respondent used profanity, but he would use the "F" word to represent the Respondent's choice of words.

palms up asking the Respondent what he was doing. In the next instant, an officer "rushed" Foster to the side of the car and placed him in handcuffs. Veale said at that time, the Respondent removed his forearm from his neck.

Veale testified that once he was released by the Respondent, he dialed his mother on his cell phone. He told her he was stopped by males, that he did not know whether or not they were police officers, and that they stated that they were going to take Foster to jail. As his mother inquired about his whereabouts, the Respondent told him to "hang up the phone." Veale said he told him since he was not identifying himself he was telling his mother what was happening. The Respondent again told him to get off of the cell phone. Veale replied, "No, I am still talking to my mom." The Respondent said, "Get the F off the phone," as he proceeded to take Veale's cell phone from his hand and inform him that he was going to jail. Veale denied using any profanity during this incident. He also stated that he did not yell at the Respondent or anyone else at the scene. Veale said that he had never been arrested before this date and that he has not filed a lawsuit in connection with this incident.

Veale testified that the incident occurred on a summer night and that there were a lot of people outside. He said that he could not put a number on how many people were outside, but if he had to estimate, he would state that between 35-40 people were outside. Veale said that the vehicle the Respondent came out of had lights on top of it, but the lights were not turned on. He said that he did not hear any noise that would make him believe that vehicle was a police vehicle. He stated that he believed the males that stopped him were officers because he did see guns on their waists at some point after he exited his vehicle.

Veale testified that he is 5'11" and weighs approximately 215 pounds. He stated that on August 27, 2005, an officer who was not the Respondent approached his vehicle and asked him for his identification, which included his registration and insurance. He noted that the male who stopped him was a Spanish gentleman with a Caesar-type haircut.

During cross-examination, Veale admitted that he spoke about this incident with his friends, Foster and Davis. He acknowledged that he spoke to Davis about the incident that morning. Veale admitted that the first person who approached his vehicle was wearing a Punisher tee shirt and it was not the Respondent. He stated that that person also told everyone in the vehicle to exit. Veale said that his first contact with the Respondent was when the Respondent placed his forearm against his throat. He acknowledged that the Respondent did not have any conversation with him before placing his forearm under his neck. He noted that when Foster threw his hands up in the air and questioned what they were doing, Foster was placed under arrest by the male in the Punisher tee shirt and another male neither of whom were the Respondent. Veale stated that he realized the males were police officers when the Respondent took his cell phone and told him that he was going to jail.

Veale acknowledged that he had contacted the CCRB on August 29, 2005. He stated that he informed the investigator that the Respondent put his forearm in his neck but that the investigator wrote that he placed his elbow in his throat. Veale stated that he never had a discussion with his friends about them being in fear that they were about to be robbed. When questioned as to why he kept insisting on finding out whom the males were, Veale replied, "And it was the wrong way to handle things. There is supposed to



be some kind of courtesy when you are stopping somebody like that, and they had no reason to stop.” Veale testified that the Respondent never showed him his badge. Veale said that he received summonses in this matter from the Respondent and he could not understand this. He explained that when the Respondent approached him, he came out of one of the back seats in the car. He further explained that he could not understand how the Respondent was able to see anything that was taking place from the rear seat of the car.

During redirect examination, Veale testified that he received a pink summons which required him to report to Criminal Court. He could not recall exactly what the summons was for, but it had something to do with his behavior on the incident date. He also received summonses for making an insufficient turn, failing to comply with an order and operating a vehicle without insurance. He stated that two to three weeks after receiving the summonses, he received a notice in the mail that he did not have to report to court on the pink summons. With regard to the other three summonses, Veale said that he went to the Department of Motor Vehicles on four occasions in a two-year period. He provided proof that he had insurance on his car. He noted that the Respondent did not show up on two of the four dates and the fourth date, since the Respondent was not present, the summonses were dismissed.

When asked to explain what he meant when he stated that the officers were not courteous, Veale explained: “Every time I am around a cop, I shouldn’t have to feel like I am being—something is going to happen to me...What happened to me was not right. I have been stopped by cops before, and a cop would tell me what the situation was, what’s going on...And so none of theses officers did that.” He further stated that he felt that he

was treated like a criminal when he was fingerprinted even though he is a hardworking individual who works two jobs.

During further cross examination, Veale testified that he was fingerprinted on the night of the incident. He acknowledged that he had been stopped by police officers before. He stated that he did not have to ask the other officers for identification.

During further direct examination, Veale explained that he did not have to ask the other officers who stopped him in the past for identification because they explained to him why he was being stopped.

During questioning by the Court, Veale explained that he did not have to ask other police officers who stopped him in the past for identification because they were either wearing a police uniform or if they were a detective, they were wearing a chain with a badge. Veale stated that he did not see any of the officers who stopped him with a chain and a badge around their necks. He explained that even though he saw the males with guns, he did not know for certain that they were police officers. Veale stated that he works in customer service at Home Depot in the phone center where he contacts customers with special orders. He said that he works as a meter reader for Con Edison and some of the vehicles he drives have portable as well as stationary lights on them.

#### The Respondent's Case

Respondent's Exhibit ("RX") A is a seven -page document. Six of the pages are Department of Motor Vehicle police appearance listings for the Traffic Violations Bureau. The appearance dates cover: February 16, 2006, July 13, 2006, September 28, 2006, February 15, 2007, April 5, 2007, and May 16, 2007. Each date lists the three

summonses issued to Veale on August 27, 2005. None of the appearance listings note whether or not the Respondent was notified to appear. There is only one entry for the May 16, 2007 date which has the three Veale summonses circled and notes that the case was cancelled three times prior and the case will not be rescheduled. There is only one notification attached to RX A which states that the Respondent is to appear in the Bronx Parking Violations Bureau on July 13, 2006.

Court Exhibit ("CX") 1 is a copy of various dates of the Respondent's Activity Log to cover six of the Traffic Court Appearance dates for the Veale matter. Regarding the February 16, 2006 date, there is no Activity Log entry for that date received in evidence. For July 13, 2006, there is no entry in the Respondent's Activity Log to note that he appeared in Traffic Court other than the entry, "Return date: 9/12/06." For September 28, 2006, the Respondent noted in his Activity Log that it was his regular day off. For February 15, 2007 the Respondent was assigned to the desk at the command from 6:55 a.m. to 3:52 p.m. On April 5, 2007, the Respondent went administrative sick, and on May 16, 2007, the Respondent was on vacation.

The Respondent called Sergeant Jesus Freytes and Detective Jesus Capo as witnesses and testified in his own behalf.

Sergeant Jesus Freytes

Freytes is a 19-year member of the Department currently assigned to the 44 Precinct. He said that he has been in the rank of sergeant for almost three years. In August 2005, he was assigned to the 44 Precinct Station House where he worked patrol and then he was assigned as the Anticrime sergeant where he worked primarily with the

Respondent, a police officer named Robbins, who was later replaced by a police officer named Capo. On August 27, 2005, Freytes testified that he was working a tour with the Respondent and who he thought was Robbins; but he later learned that he worked the tour with the Respondent and Capo. They were in plainclothes assigned to an unmarked, black, Crown Victoria. Freytes said that he was in the rear of the car seated either behind Capo or the Respondent and he could not recall who was driving.

Freytes testified that he observed a white, hatchback traveling northbound on the [REDACTED]. The car made a left turn on either [REDACTED] or [REDACTED] Street. Freytes recalled seeing damage to the rear lock on the hatchback as well as damage to the passenger side door. A decision was made to stop the vehicle and conduct an investigation. Freytes said that he and the other two officers all exited the vehicle. He initially approached the passenger side, but after he heard the Respondent order the driver out of the car, he walked over to the driver's side. Freytes stated that he ordered Veale to the rear of his car. At some point, Freytes recalled seeing the Respondent go back to the Department car.

Freytes recalled that Veale seemed upset. He heard Veale inquire as to why he was being stopped and how would he know if they were the police. Freytes said that he pulled out his shield and was "dangling it." He told Veale that he had his shield, gun and radio and that the car with the light on was a police car. Freytes said that Veale then pulled out his cell phone and began to make a call on it stating that he did not know if they were really police officers. Freytes stated that he grabbed the cell phone from Veale, and as he tried to explain to him the reason for the stop, Veale did not want to hear anything. He said that the louder Veale became, the larger the crowd began to form and

he wanted to keep the situation calm. Freytes explained that in that area, people were known to throw objects off of the roof and he wanted to keep everyone safe. Freytes said he then told Veale to turn around and as Veale questioned him, he proceeded to place Veale in handcuffs.

Freytes described that he had Veale pinned against his car with his [Freytes] forearm against Veale's back. He stated that the Respondent came over to assist him in placing Veale in handcuffs. At some point, Foster started yelling or screaming and Freytes stated that he decided to take Foster into custody for his safety. He explained that the crowd was forming in an attempt to see what was taking place. He decided that it would be best to take the parties into custody and then issue summonses to them at the station house. Freytes said the third person from the car [identified as Davis] was the "Most polite out of all of them," and since he did not "give us any lip" and was responsive to questions, he was let go. Freytes said that at no point did he hear Veale ask him for his identification. He stated that Veale did not ask the Respondent for his name at the scene.

Once the Respondent issued summonses to Veale at the station house, Freytes testified that Veale asked the Respondent for his name. Freytes said that he heard the Respondent tell Veale that all of his information was contained on the summons, including his name, tax number and any other information that he needed. Freytes stated that at no point did he hear the Respondent use profanity when speaking to Veale.

During cross examination, Freytes stated that he did not issue the summonses to Veale, but he knew that Veale received a summons for disorderly conduct and other traffic infractions. Freytes denied that Veale was issued summonses for "giving lip" or

being impolite or belligerent. Freytes acknowledged that these were not summonsable offenses. Freytes explained that Veale was belligerent in that when he tried to explain to him why he was being stopped, Veale became confrontational and acted as if he did not want to hear the reason for the stop.

Freytes acknowledged that he was interviewed by CCRB investigator Abels on February 28, 2006. He admitted that he told Abels that he was in the car only with the Respondent who was the driver. He later explained that he was mistaken and that another police officer was with them. Freytes said that he asked Foster and Davis for identification. He believed one of them had identification which showed that he lived in the vicinity of the stop. Freytes acknowledged that he stopped the driver of a 13-year old Ford Festiva with car damage. He explained that he did not stop the vehicle for the damage to the car; he stopped the vehicle because the passenger lock on the car appeared to have been removed and it seemed as if someone removed it to gain entry to the car such that the car may have been stolen. Freytes denied that the reason he stopped the car was because there were three, young, black, men in the car.

Freytes could not recall if the car was also stopped for any Vehicle and Traffic Law violations. He recalled that the car he was riding in had a Mobile Digital Terminal ("MDT") inside of it. He denied that he did a license plate check on the car using the MDT before exiting his vehicle to determine if Veale's car was reported stolen. Freytes denied that he contacted the dispatcher or central to advise them that he stopped a car that could possibly be stolen. Freytes admitted that he frisked all three individuals that had been in the car before there were handcuffed. He did not believe that the Respondent frisked any of them. Freytes testified that it was his decision to frisk the individuals.

Freytes stated that Veale was uncooperative and yelling. When asked what he was yelling, Freytes stated that he was yelling out to his mother in a window. He could not recall if the mother responded to Veale. Freytes admitted that Veale also attempted to call someone on his cell phone when he took the phone away from him. Freytes did not believe Veale was actually in conversation with anyone on the cell phone at the time. Freytes said the only profanity he heard Veale utter was, "This is bullsh--." Freytes said that Veale never made any threatening gestures; he did not flail his arms, reach for his waistband or place his hands in his pockets. Freytes admitted that he did not feel threatened by Veale. He acknowledged that Veale was upset because he had been stopped. He also acknowledged that Veale wanted proof that they were police officers. Freytes admitted that he never gave Veale his name and he did not think Veale asked him for his name or for the Respondent's name. He explained that when Veale requested proof that they were police officers, he told Veale to step out of his vehicle and once out of the vehicle, he would explain everything to him. When asked whether he explained anything to Veale, Freytes replied, "We had our shields out, all of our equipment out." He acknowledged that he did not explain to Veale why he was being stopped and neither did the Respondent or Capo.

Freytes acknowledged that no force was used to get Veale to exit his car. He admitted that Veale was cooperative and did turn over his driver's license. He acknowledged that Veale did not resist during the arrest process. He later changed his mind and said Veale was not cooperative because he did not initially turn over his license upon the first request. Freytes estimated that there were more than 40 people out on the street the night of this incident in August, but he denied that the people out on the street

could be characterized as a crowd. Freytes acknowledged that any time he does a car stop people generally gather around to watch. He admitted that none of the civilians on the street became hostile.

Freytes testified that Foster was placed under arrest because he was disorderly. He explained that Foster kept saying, "What are you doing?" and at the same time, the crowd began to gather. When questioned as to whether Foster was inciting the crowd, Freytes stated that he did not allow things to get to that point. Freytes said that Foster kept coming forward even after he was told to relax, so he was arrested. Freytes denied that Foster came forward because the Respondent had his forearm in Veale's throat. Freytes also denied hearing the Respondent use profanity or the "F" word.

Upon questioning by the Court, Freytes stated that when he decides to remove someone from the scene for safety reasons, he normally places the individual in handcuffs before placing him or her in the Department vehicle. Freytes testified that he is five feet 11 inches tall and that Veale was a little taller and had a more muscular build than him. He also stated that he was the tallest member of the service when compared to the Respondent and Capo. He noted that he had a clean shaven head in court and he had a clean shaven head on August 27, 2005, the night of the incident. He also noted that at midnight on August 27, 2005, it was a summer night and that people were hanging out and walking around the building on Gerard Avenue. He explained that it was for these reasons he removed all parties from the street. He explained that two weeks earlier, when he was making an arrest, people began to throw objects at the officers from the rooftops.

During further cross-examination, Freytes said that he removed the parties to the station house to calm the situation as well as to issue the summonses there.



Detective Jesus Capo

Capo is a six and a half year member of the Department currently assigned to the Vice Enforcement Division Bronx. Capo testified that on August 27, 2005, he may have been working in the confines of the 44 Precinct doing Anticrime work. He stated that he worked with the Respondent who was a police officer at the time, and he also worked with a supervisor named Freytes. Capo explained that they did work in the area of [REDACTED]

[REDACTED] He said the area was known for violence. He stated that he worked in plain clothes and used an unmarked car. He explained that the unmarked car had lights on the dashboard as well as on top of the mirror inside the car, but there were no police lights on the outside of the car.

Capo testified that his team made a car stop in the vicinity of [REDACTED] and [REDACTED] avenues. He explained that they stopped the car and that himself, the Respondent and Freytes all exited their car once the car stopped. Capo said that he could vaguely remember the stop, but he recalled that all of the civilians had to exit their vehicle. He said that he could not recall much more with respect to the car stop. He said that he knew who the Punisher character was and that he may have owned a tee shirt with his likeness on it and wore it when he worked in vice.

During cross examination, Capo said that he could not recall all of the details of this incident, but he did have conversations with the Respondent and Freytes about it. He said that they would ask him if he remembered certain things happening, but it was a very vague conversation. Capo said no one told him that all three of them got out of the car together, but it was routine procedure for all of them to exit the car at the same time. Capo acknowledged that he did not have any independent recollection of the events of

this incident. He could not recall how many occupants were in the car that he stopped. He could not recall the make and model of the car stopped. He could not recall making any arrests. He did recall that he was the driver of the vehicle.

Capo stated that he remembered being interviewed by CCRB, but he could not recall the date. He was read a question and answer from the CCRB interview held on March 26, 2006: (page 11)

**“Question: Directing your attention to approximately 11:00 p.m. on August 26, 2005, in as much detail as you can, can you please tell me what happened?”**

**Answer: I have (inaudible), I don’t recall this at all, the incident.”**

Capo acknowledged that if that was what the paper stated, that is what he was asked. He was also read further information which gave him the names of the civilians and the location of the incident and he responded that he did not recall the incident. Capo again stated that if that was what was contained on the paper that is what he was asked about.

During redirect examination, Capo stated that in August of 2005, he made between 35-40 car stops a week. He explained that he was able to remember a little bit about the stop from talking to his peers.

During questioning by the Court, Capo stated that he became a detective in March 2007. He explained that when he worked Anticrime, he was assigned to the 44 Precinct, but when he worked vice, it was a citywide assignment. He stated that he changed his hair style from clean shaven (as it was in Court) to Caesars and fades. He could not recall how he wore his hair in August 2005.

The Respondent

The Respondent is a nine and a half year member of the Department currently assigned to the Housing Bureau. He testified that he has been in the rank of sergeant since December 30, 2005. He stated that in August 2005 he was a police officer assigned to the Anticrime Unit within the confines of the 44 Precinct. He said that he had been assigned to the 44 Precinct for approximately nine years. He spent the majority of his time working patrol and then spent between five to six months in the Anticrime Unit. While assigned to the 44 Precinct, the Respondent said that he made hundreds of car stops. He estimated that he made 20 grand larceny auto arrests. When stopping a vehicle suspected of grand larceny, the Respondent testified that there are several things he looked for. He said that he looked for damage to the car windows, a license plate held with only one screw, or a driver who appeared nervous and made left and right turns to see if he was being followed.

On August 27, 2005, the Respondent testified that he believed he was working from 5:30 p.m. to 2:05 a.m. He was working with Freytes and Capo. He said that he initially thought he had been working with Robbins. He said they were in a black, Crown Victoria with tinted windows. The vehicle had strobe lights on each corner headlight, on the rear lights and on the rearview mirror. It also had red lights on the grille. The Respondent recalled that he had been seated in the front, passenger seat of the vehicle. He explained that since he was not in a radio motor patrol car (RMP) at the time on routine patrol, he did not have the responsibilities of being the recorder while seated in that seat. Sometime around midnight, he observed a Ford Festiva vehicle with North Carolina plates which had fresh damage on the front, passenger door. The vehicle then

made a left turn on [REDACTED] Street heading westbound and failed to signal. It then made another right turn onto [REDACTED] and again failed to signal. The Respondent stated that they decided to pull the vehicle over. The Respondent explained that there was no conversation in their car about pulling over the vehicle. He had just decided on his own to stop the car and Capo who was driving agreed.

The Respondent stated that he exited his vehicle and approached the Ford Festiva. He asked the driver, Veale, for his license and registration. Veale then asked why he was being pulled over. The Respondent said that he told Veale that he will let them know why he was stopped as soon as he gets his information. He asked Veale for his driver's license and registration again so that he could go to his vehicle. The Respondent said that Freytes walked over to the driver's side of Veale's vehicle, he [the Respondent] then opened Veale's driver's side door and Veale stepped out of his car. The Respondent recalled that at some point he obtained Veale's driver's license either from Freytes or Veale directly. He then went back to his car to conduct a check of the license. He said that Veale either failed to produce his registration or the insurance card on the vehicle, so he decided to check the license using his vehicle's Mobile Digital Terminal ("MDT"). The Respondent testified that the driver's license was valid and the registration was okay, but that the vehicle's insurance had expired. The Respondent said that he would later issue summonses to Veale for the lack of insurance, failure to signal and disorderly conduct for his threatening behavior.

As he remained inside the Department vehicle, the Respondent said he overheard Freytes tell Veale to come to the rear of his vehicle. He also heard Capo tell the other two occupants to exit the vehicle and go to the rear. The Respondent stated that while he

was using the computer in the car, he maintained a visual of his surroundings as he was trained to do. He also noted that the tone of the conversation was getting a little heated and that voices were raised. He then decided to exit the vehicle and approach the sergeant and Veale. The Respondent explained that situations usually get "out of hand" because people do not take the time to talk to the people being pulled over. The Respondent said that he attempted to talk to Veale, but Veale did not want to hear anything. He said that Veale kept repeatedly saying, "This is bullsh--," and the crowd began to move toward the car. The Respondent said that he had problems in the area with people throwing objects off of the rooftops at police officers. He was thinking that it may be best to leave the area, and Freytes made the decision before he did to leave.

The Respondent testified that Freytes asked Veale to turn around. As Veale turned, the Respondent said that he took out his handcuffs and began to handcuff Veale. As this took place, Foster jumped out and said, "What are you doing?" Foster began to move toward Veale and Capo detained him. Freytes responded by saying to take the two of them to the station house, so Capo then took Foster into custody. The Respondent said that Veale did not resist. Since his hands were already behind his back, the only physical contact he had with him was to touch his forearm to place the handcuffs on him, and to take his arm to place him in the back of the Department vehicle. The Respondent said that he drove back to the station house while Veale, Foster and Capo sat in the rear of the Department vehicle.

The Respondent said that Veale asked him for his name and shield number at the station house just as he was being released with the summonses. He also recalled hearing Veale ask at the incident location how would he [Veale] know they were cops.

The Respondent said it was at that moment that he took out his shield and showed it to Veale. The Respondent stated that he could not recall the conversation ever getting heated between him and Veale. He denied using any vulgarity and said the only time he may have said anything vulgar was when he was leaving the scene and he turned to Capo and said, "Let's get the f- out of here."

The Respondent described the area around [REDACTED] as a known drug area. He said that there is a lot of gang activity in the area. The Respondent said on Walton Avenue someone threw a battery at a police officer and broke her arm. A sergeant was struck with a brick breaking his hand and in another incident, someone through a fax machine down striking the roof of an RMP. The Respondent said when he arrived at the location on [REDACTED] there were ten to 11 people. As he went back to his vehicle, he noticed the crowd coming toward them.

With regard to the summonses he issued to Veale, the Respondent testified that he went to the roll call person at his command to copy all of the notifications with regard to the dates in question. The Respondent said on April 5, 2006, he was out sick on that date. On the July 13, 2006 date, the Respondent stated he appeared, but the case was adjourned because Veale did not have the proper paperwork to show his proof of insurance. The Respondent testified that he did not appear in court on the February 15, 2007 date. He explained that he worked from 6:55 a.m. to 3:52 p.m. on that date and that the court appearance was scheduled for 4:30 p.m. He said that he was never notified to appear and speculated that the date was scheduled because the Department would not pay him overtime to appear in Traffic Court. On May 16, 2007, the Respondent said he was on

vacation on that date. The Respondent stated that he did not appear in Traffic Court on September 28, 2006 because it was his regular day off.

The Respondent denied that he ever placed his forearm underneath Veale's neck or chin. He also denied using the "F" word toward Veale. He said that when Veale asked him for his name and shield number, he showed it to him on the summons.

During cross-examination, the Respondent acknowledged that when a civilian asks for his name and shield number, he is supposed to give his name and shield number to the civilian verbally. The Respondent then explained that he read the court return date to Veale. He further explained that he read out his name and tax number to Veale. The Respondent acknowledged that he did not testify to that in court during his direct examination because "That's what I'm saying now."

The Respondent was questioned as to whether the make and model of a car is a factor considered when deciding whether a car is stolen. He acknowledged that Veale's 1992 Ford Festiva was not ranked in the order of stolen cars. The Respondent said he stopped Veale's car not because it had damage, but because he failed to signal when turning. The Respondent stated that he did notice the damage to Veale's car. The Respondent admitted that he had a lengthy Activity Log entry regarding this stop. He also admitted that he failed to make an entry regarding the damage he observed to Veale's car. He explained that the damage had no bearing on the stop he made for the traffic infraction of failing to signal.

The Respondent acknowledged that during the course of this traffic stop he checked Veale's signals and found them to be operational. The Respondent was read a portion of his CCRB interview held on January 30, 2006 before Investigator Abels.

The Respondent told Abels that the signals were inspected and appeared not to be operational and a summons was issued. The Respondent explained that that was not what he told the CCRB investigator and that a mistake was made. The Respondent stated that when he stopped Veale, he did not make a call to the dispatcher to inform the Department that he was making a car stop. The Respondent said that after he checked Veale's information using the MDT, he knew that the vehicle was not stolen and that the insurance had expired. He acknowledged that he knew this information even before he approached Veale's vehicle.

The Respondent acknowledged that Veale voluntarily turned over his driver's license. When questioned as to why the Respondent told the CCRB investigator that Veale had not turned over any paperwork, he explained that although Veale had his license, he did not have any paperwork for the car such as his registration and insurance. The Respondent admitted that Veale was never told why he was stopped while he was inside of his car. The Respondent explained that he never tells a civilian the basis of the stop until he receives the paperwork on the car and in this case, Veale did not supply his driver's license until he exited his vehicle. The Respondent further explained that when he saw that things were getting heated outside, he exited the Department vehicle and told Veale that his insurance had expired and that he did not signal when he made turns, but Veale seemed disinterested.

The Respondent admitted that Veale was combative, uncooperative, yelling obscenities, and making threatening gestures. When asked to explain how, the Respondent said that Veale was flailing his arms and repeatedly saying, "This is bullsh--" causing a crowd to gather which made the Respondent feel threatened by the situation.



The Respondent denied that the crowd was gathering because he placed his forearm in Veale's throat area. He denied using any force to get Veale out of his vehicle, to place him in handcuffs or to remove him to the Department vehicle. The Respondent denied being upset because Veale repeatedly asked him who he was and why he was being stopped. The Respondent also denied frisking Veale or observing any other police officer frisk him.

The Respondent stated that he did not hear Foster utter any obscenities. He denied that Foster tried to intervene because he (the Respondent) was choking Veale. The Respondent did not recall seeing Veale either trying to make a cell phone call or in possession of a cell phone. The Respondent acknowledged that he repeatedly heard Veale ask if they were cops. He admitted hearing Veale repeatedly ask why he was being stopped. When asked if in between Veale's yelling whether he [Veale] was asking legitimate questions, the Respondent replied that he exited the Department vehicle to explain to Veale why he was being stopped, but Veale did not want to listen. The Respondent said he did not have his shield inside of his shirt; he brought it up to eye level to show Veale. He said that he did not show Veale his Department identification card because he does not show it to anyone. The Respondent denied taking his right elbow, and holding it against Veale's throat as he took out his shield and put it in Veale's face. The Respondent admitted that he said to Veale, "You have things that you do on your job, procedures. I have mine." The Respondent said that he used these words to try to diffuse the situation. When asked why he did not just tell Veale the basis for the stop, the Respondent said he only asked him for his information. The Respondent denied cursing

in any fashion. The Respondent said that Veale never asked for his name and shield number at the scene.

Upon questioning by the Court, the Respondent said that while he was running Veale's information in the Department vehicle he heard the conversation getting louder outside. He decided to exit the Department vehicle and approach Veale to tell him why he was being stopped, but Veale did not want to listen. Veale continued to utter profanity and the crowd gathered. The Respondent said Freytes verbally made the decision to leave the area. Once Freytes told Veale to put his hands behind his back, Freytes yelled out, "Let's get out of here." Upon review of his Activity Log, the Respondent said he issued summons number 424895873-9 to Veale for failing to signal when turning. He also issued him summons number 424895874-0 for failing to comply with a lawful order to produce his driver's license, summons number 42489575-2 for operating an uninsured vehicle, and summons number 424895876-4 for disorderly conduct. His Activity Log also noted that he issued summons number 424895876-4 for making threatening gestures and yelling obscenities.

With respect to the paperwork he received from roll call regarding his court notifications, the Respondent said that he did not make any changes to the documents. He said that he simply compared the copies he received from roll call to the entries he had in his Activity Log. He noted that most of the dates he was scheduled to appear in court were set on his regular day off. He said that he was transferred to housing after his promotion to the rank of sergeant.

The Respondent testified that he is five feet 11 inches. He said that the way he is wearing his hair in court is the way he was wearing it in August of 2005 [a low-Cesar-

type haircut with even shorter hair on the top. He explained that he was losing his hair and he wears it even shorter in the summer months.

### FINDINGS AND ANALYSIS<sup>4</sup>

The Respondent stands charged with using excessive force in that he thrust his forearm against the throat of Veale. He is also charged with being discourteous to Veale, Davis and Foster in that he used the "F" word on numerous occasions when addressing them on August 27, 2005. The Respondent is further charged with failing to provide his name and shield number to Veale. The Respondent is found Guilty as charged. This court found the testimony of each complaining witness, Veale, Davis, and Foster to be credible and reliable. Each witness testified in a calm, reserved manner. The three witnesses were gainfully employed: Veale as a meter reader for Con Edison and a customer service representative for Home Depot; Davis as a supervisor at Circuit City; and Foster as an electrical splicer for Con Edison. Each testified that the Respondent put his forearm under Veale's chin after he was ordered out of the car.

Veale, Davis and Foster each testified that they have never been in trouble with the law aside from this incident. They each testified that they were members of the Jehovah's Witness faith and that it was against their religion to swear and as such, they did not use profanity. Yet each stated that the Respondent repeatedly used the "F" word during the incident and failed to identify himself. Veale, Davis and Foster each testified that they did not have a lawsuit pending against the City of New York with respect to this August 27, 2005 incident.

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<sup>4</sup> Upon review of RX A and CX 1, this Court did not use this evidence as they were not considered relevant evidence to the Findings and Analysis of the Charges and Specifications in this matter.

Capo and Freytes testified on behalf of the Respondent. Capo could not recall the events of August 27, 2005. He acknowledged that despite having conversations with Freytes and the Respondent, he still could not recall much of the incident. He could not recall, for example, how many people were stopped and whether or not any arrests were made. Indeed, Capo conceded that in his CCRB interview held on March 26, 2006, closer to date of the incident, he could not recall the incident at all.

Therefore I found that Capo added nothing of substance to be considered in the evaluation of the facts.

Freytes's testimony corroborated Veale and the other Department witnesses in a few important respects. Freytes, the supervisor on the scene, acknowledged during cross-examination that Veale was upset that he was stopped and he wanted proof that they were police officers, but that he never gave Veale his name and shield number. Freytes testified that he was at Veale's car window when he heard Veale ask for his identification, so he pulled out his shield and was "dangling it." Freytes stated that he ordered Veale, Davis and Foster out of the car and frisked all three of them. He further stated that he told Veale at one point that once he stepped out of the car, he would explain everything to him, yet he acknowledged during cross-examination that he never explained to Veale why he was stopped and neither did the Respondent or Capo. Moreover, Freytes testified that when Veale asked the Respondent for his name at the station house, the Respondent replied that all of the information, such as his name and tax number, could be found on the summons. This evidence corroborates Veale, Davis and Foster's testimony that the Respondent never identified himself.

The Respondent raised as a defense to these charges that the complaining witnesses were inconsistent in their accounts of what took place. For one, it was stated that Davis only observed two police officers approach Veale's car when three police officers approached. Davis testified that he observed two officers approach Veale's window as he sat in the rear of the car. Davis's attention seemed to be focused on what was happening on the driver's side of the car. It is believable that he only observed two officers approach the car at that time. Davis was looking out of the car window on the driver's side from the rear, passenger seat. It is also clear from the testimony, that following his exit from the car, he had a clearer view of the scene and who was present.

The Respondent also challenged Foster's testimony. Foster testified that he did not observe the Respondent's gun although Davis and Veale stated that they saw the Respondent's gun on his waist. Also, Foster could not recall how many people were in the crowd. Testimony at trial elicited that Foster was focused on the force being used against his friend Veale and not focused on the Respondent's waist area or how many people were in the crowd. In addition, Foster was arrested first during this incident and placed in the back of the Department vehicle. His observations would be different in time than Davis, who was an observer of the entire incident and who was never taken into police custody. For example, Davis testified that he observed the officers looking in Veale's car with flashlights and Foster did not testify to this. Thus, I noted that Foster's testimony and observations were different than the other witnesses in certain respects given their different roles in the incident, but it did not lessen the reliability of his testimony.

What gives credence to the Department witnesses' version of events is the way that the car stop was conducted as analyzed in the discussion of Specification No. 3.

The Respondent acknowledged that he failed to inform the civilian stopped of the reason he was being detained. It is apparent that this practice on the Respondent's part led to the events that later transpired.

Specification No. 3<sup>5</sup>

The Respondent is charged with failing to provide his name and shield number to Veale. Evidence adduced at trial established that the Respondent, who was then a police officer, was working with his Anticrime team in plainclothes on the night in question.

The Respondent testified that he observed Veale's car with damage to the passenger side door and he also observed Veale make two turns without signaling, so he decided that the vehicle would be stopped. Veale testified that he had just left the bowling alley with some friends and was dropping them home. When he stopped at Davis's house on

██████████ he heard a voice yell for them to remain in the car and he and his friends complied.

Veale, Davis and Foster each testified that Veale continued to ask the Respondent for his name and the purpose of the stop and the Respondent never answered him either while Veale was inside his vehicle or after he was ordered out of his vehicle. Veale testified that he asked the Respondent at least three times to identify himself while outside of his vehicle to no avail. Veale ended up calling his mother to advise her of what was transpiring. Veale testified that the Respondent took his phone and informed him that he was going to jail. Veale testified that he was placed in handcuffs and was later fingerprinted at the station house. He became very emotional when he testified that

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<sup>5</sup> The Charges and Specifications are addressed out of order.

he was a hardworking man who worked two jobs and did not understand how he ended up arrested. According to Veale, he never received a verbal response from the Respondent or any other police officer as to who they were and why he was stopped.

Freytes described Davis as “Most polite out of all of them” since he did not “give us any lip.” Davis testified that once he asked what was going on and none of the males answered, he decided to keep quiet. It was Veale who continued to ask the Respondent and the other officers who they were and why they were stopped; and Foster who questioned what was happening that caused both of them to end up under arrest.

The Respondent testified that it was his practice not to tell the individuals the basis of the stop until they provide paperwork, and since Veale did not provide his license until he was out of his car, he never responded to his questions while Veale was stopped inside of his car. He also testified that he told Veale once he provided his paperwork he would explain everything, but that never transpired. It is the belief of this Court that when the Respondent dressed in plainclothes stopped Veale in his vehicle and approached him, Veale had a right to ask the Respondent who he was and why he was being stopped, even repeatedly, when the Respondent failed to do so.

The Respondent claims that he tried to explain to Veale the reason for the car stop after he checked his paperwork, but Veale did not want to listen to him. Veale, however, denied that this took place. It is ironic that the Respondent testified that when he was running Veale’s license and heard the voices rising, he stated that situations get “out of hand” because people do not take the time to talk to people being pulled over. Yet this is precisely what the Respondent admitted to doing. He admitted that he failed to tell Veale the basis of the car stop when he initially approached Veale’s vehicle and

Veale testified that the Respondent never told him who he was and why he was being stopped.

The Respondent testified on direct examination that just as Veale received the summonses in the station house, he asked the Respondent for his name and shield number. The Respondent said that he showed Veale the information on the summons and he showed him his shield. Freytes testified that the Respondent said to Veale that his name, tax number and any other information he needed was on the summons. The Respondent never testified that he verbally gave Veale his name and shield number. It was not until cross-examination, that the Respondent testified that he read his name and information off of the summons to Veale. I did not credit this testimony. Moreover, it is contrary to the requirements of the Patrol Guide. Patrol Guide 203-09 states in pertinent part:

**“1. Courteously and clearly state your rank, name shield number and command, or otherwise provide them, to anyone who requests you to do so. Allow the person ample time to note this information.”** (Emphasis Added)

Nothing in the Patrol Guide allows the Respondent to simply raise his shield in Veale's face, lift his shield off of his chest, or to show Veale the summons in response to a request to identify himself.

Based on the Respondent's own testimony, there were at least two instances on August 27, 2005 when the Respondent failed to identify himself. First, upon the initial car stop of Veale's vehicle when he made inquiries and second, when the Respondent issued summonses to Veale following his arrest at the station house and Veale asked him for his name.

Accordingly, I find the Respondent Guilty of failing to identify himself to Veale.



Specification No. 1

The Respondent stands charged herein with using excessive force in that he thrust his forearm against Veale's throat. Davis testified that he heard Veale continue to question the male he was speaking to about his identity. He then observed a male, who he identified in court to be the Respondent, exit the car and state, "I got this one." He then rushed up to Veale and placed his forearm under Veale's chin. The Respondent raised as a defense that Veale, who stood at 5'11" and weighed 215 pounds was much bigger than the Respondent and thus the Respondent could not put his forearm under Veale's chin. Davis testified, however, that the Respondent had to be using some force because Veale was a big guy and the motion the Respondent used caused Veale to "lean back over his car."

Foster testified that he observed the Respondent exit his car, push aside two police officers, push Veale onto his car using his forearm against his throat while using profanity and stating, "This is who the F I am, this is who the F I am." Foster was believable when he stated that he observed Veale having trouble breathing and he asked the officers what they were going to do to help his friend and when no one answered, he took a few steps forward and was then placed under arrest. Veale testified that he observed the Respondent exit his car, say "I got this one," as he approached him and placed his right forearm in his throat area. I credited the testimony of Davis, Foster and Veale as to the action the Respondent took upon exiting his car which was to place his forearm in Veale's throat.

The Respondent vehemently denied using any force against Veale by placing his forearm under his chin or at his throat. He testified that when the voices were raised, he

quickly exited his car to tell Veale why he was stopped. I found this testimony to be lacking in credibility. At no time prior to this point did the Respondent feel the need to tell Veale why he was stopped. In fact, the Respondent testified that when he initially approached the vehicle, he asked Veale for his paperwork and acknowledged that he never advised him of why he was being stopped. Instead, Davis, Foster and Veale each stated that as Veale continued to raise questions, the Respondent came out of his vehicle and placed his forearm at Veale's throat.

Veale testified that it was the lack of courtesy and professionalism which caused him to file a civilian complaint about the incident. He stated that he had been stopped by the police in the past and the police officers always explained to him what was taking place. Davis testified that the Respondent came with such force that it caused Veale, a strong built man to fall against his car. Foster testified that the Respondent's action caused him to step forward resulting in his subsequent arrest. Both Veale and Davis testified that it was when the Respondent had his forearm at Veale's throat that he used profanity and told him that he does not tell him [Veale] how to do his job. As noted, I found this testimony credible.

The Respondent is charged with using excessive force in that he thrust his forearm against Veale's throat. I concur. All of the Department and Respondent witnesses testified that Veale was never aggressive, that he did not engage in any furtive movements and that he did not use any force against the officers during this incident which might have supported some physical response from the Respondent. Freytes testified that Veale did not flail his arms, reach for his pockets or engage in any threatening gestures. He even stated that he was not threatened by Veale. This is despite

the fact that testimony elicited at trial had Veale described as a stocky build with a height of 5 feet 11 inches and a weight of approximately 215 pounds. Although the Respondent denied using any force, Veale, Foster and Davis all testified that the Respondent put his forearm in Veale's throat. This use of force, without a purpose, is excessive.

Accordingly, I find the Respondent Guilty of using excessive force in that he thrust his forearm in Veale's throat.

#### Specification No. 2

The Respondent is charged with being discourteous in that he repeatedly used the words "fuck and "fucking" when addressing Davis, Veale and Foster. Davis testified that he heard the Respondent use profanity when he said to Veale, "Let me do my job. I don't question where you work...let me do my F-ing job." Davis also heard the Respondent ask Veale where he worked and when Veale responded, the Respondent again used profanity and called him an "F-ing moron." Veale corroborated the "F-ing moron" comment when he testified about telling the Respondent where he worked. Foster also testified that the Respondent used profanity as he placed his forearm under Veale's chin when he said, "Let me do my F-ing job."

The Respondent denied that he ever used any profanity during the course of this incident except to possibly tell Capo, "Let's get the f- out of here." I found this statement to be self-serving. It seems unlikely that someone who refrained from using profanity during the car stop would do so at the end. On the other hand, it would be consistent for someone who used profanity during the car stop to continue to do so. Not surprisingly, the Respondent credited himself with using the one curse word that the complaining witnesses said he used throughout the incident; the "F" word. I credited the testimony of

three men, who testified that the Respondent repeatedly used the "F" word during his exchange with them, particularly with Veale. Further, the Respondent's claim that he only said to Veale, "You have things that you do on your job, procedures. I have mine," sounds far less credible than the testimony of the three witnesses.

Accordingly, I find the Respondent Guilty of being discourteous when he used the words "fuck" and "fucking" on numerous occasions when addressing individuals during a car stop.

### PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974).

The Respondent was appointed to the Police Department on December 8, 1997. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

The Respondent has been found Guilty of using excessive force against Veale, being discourteous in that he repeatedly used the "F" word while addressing Veale, Davis and Foster, and failing to provide his name and shield number to Veale. In Disciplinary Case No. 78034/02, a 16-year member with no prior disciplinary record forfeited five vacation days for wrongful arrest, abuse of authority and trespass. In that instance, the Respondent was in the process of issuing a summons to the complainant's friend when the complainant started yelling to stop him. The Respondent followed the complainant to his residence, and briefly entered the residence and arrested him for disorderly conduct. The court found that in the arrest process, the Respondent grabbed the complainant's

upper arm and thereby used excessive force. In Disciplinary Case No.77898/02, a ten-year member of the Department with no prior disciplinary record forfeited 15 vacation days for discourtesy and failing to provide his name and shield number upon request. In that matter, the Respondent repeatedly referred to the complainant as a "fucking Russian." When asked to identify himself, the Respondent pointed to his shield but did not articulate his name and shield number.

In consideration of the Respondent's service record, the fact that no injury resulted from the force used, and that the profanity used by the Respondent was not coupled with any racial slurs, I recommend that the Respondent forfeit ten vacation days.

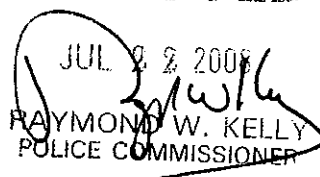
Respectfully submitted,



Claudia Daniels-DePeyster

Assistant Deputy Commissioner – Trials

**APPROVED**

JUL 22 2008  
  
RAYMOND W. KELLY  
POLICE COMMISSIONER